



August 17, 2011

E-filed

Ms. Marlene Dortch
The Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: ***Written Ex Parte Communication – ESA Waiver Request
CG Docket No. 10-213, WT Docket No. 96-198, and CG Docket No. 10-145***

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the Entertainment Software Association ("ESA") files this *ex parte* communication in response to the Notice of Proposed Rulemaking ("NPRM") as well as matters regarding the video game industry in the above-referenced proceedings. Following a series of meetings with FCC personnel, ESA has further conferred with our members and would like to supplement the record with the following additional information.

1. The duration of class waivers should not be pre-determined.

By October 8, 2011, Congress has directed the Commission to announce a new ACS regulatory framework that encompasses hundreds or thousands of products and services. Separately, the White House has asked the Commission and other independent agencies to develop a process by which all of their regulations would be regularly subject to periodic review to determine if they need to be modified.¹ Mindful of these two directives, the Commission should not expend its limited time and resources before October 2011 seeking to determine an appropriate and legally defensible end date for any particular class waiver when any waiver could be reviewed as part of the planned periodic assessments of the ACS framework as a whole. In addition, many other factors counsel against efforts to predict an appropriate sunset for a waiver for a particular class of complex and innovative multipurpose offerings, such as video games.

¹ See Executive Order, Regulation and Independent Regulatory Agencies (rel. July 11, 2011) (available as of Aug. 9, 2011 at: <http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies>) ("Regulatory Review Executive Order"); Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies (rel. July 11, 2011).

First, a predetermined end date for the class of video games would be unnecessarily speculative and arbitrary. It is axiomatic that a waiver should continue so long as the law and circumstances supporting the waiver remain accurate or unchanged. Many comments in this proceeding agree that a multiple purpose waiver for video game equipment or services is currently consistent with the statutory requirements for a waiver and with the public interest, based on current designs of equipment or services within the class.² Conversely, neither the FCC nor other commenters have any way to know whether or when the design of offerings within this class might change so notably as to require a modification or termination of the class. Nothing in the current docket provides any evidence sufficient to pinpoint when such significant changes might occur. Accordingly, it would be impossible to determine a defensible sunset date with respect to the class of video games or other complicated multiple-purpose offerings.

Second, a rigid end date undermines innovation and competition. For offerings that depend on novel concepts or technologies, the risk of regulatory ambiguity with respect to a particular type of innovation may be a sufficient deterrent to preclude investment in that sort of innovation. A concrete end-date makes a business significantly less likely to risk investments in potential innovations that may relate to advanced communications but do not rise to being a primary purpose of the gaming offering. A pre-set end date also risks regulatory arbitrage and other adverse competitive effects in that it is likely to affect different competitors within a class differently, as not all innovators may be on the same development, marketing, or return-on-investment timetable.

Third, an inflexible end date would entail significant costs without any corresponding public interest benefit. Even without a specific end date, the Commission always retains authority to re-evaluate a waiver based on the changes in circumstances necessary to justify the ultimate termination of the waiver. The Commission is better served by letting future events and circumstances suggest when a waiver should end, rather than trying to guess the appropriate end date and then spend its limited resources to conduct a proceeding immediately prior to that date to see if it had guessed correctly. In addition, when faced with a pre-determined end date, some affected stakeholders may decide to seek their own precautionary waivers before the period ends, which in turn may require additional Commission resources and undermine the pro-competitive and other public interest benefits of a class waiver.³ In addition, it is routine for companies to engage the Commission as they introduce new services if there is any ambiguity about whether their offering will comply with the FCC's rules. This serves as another mechanism that will help to ensure that companies remain in compliance with the FCC's rules.

Fourth, and as noted, the recent Regulatory Review Executive Order underscores that all regulations should be periodically reviewed. The Order specifically asks

² See, e.g., ESA Reply Comments, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198, at 10-11 (filed May 23, 2011).

³ Cf. ESA Comments, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198, at 14-15 (filed April 25, 2011) (detailing public interest benefits of class waivers).

independent agencies "[t]o facilitate the periodic review of existing significant regulations" and to release a plan under which "the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, or expanded."⁴ Pursuant to this Order, the entire ACS regulatory framework will be subject to periodic review. Such periodic review also may include consideration of all existing class waivers. Spending any Commission resources now to isolate a speculative end date for a particular class waiver seems to convey little or no public interest benefit when the Commission intends to review the whole ACS framework at some future date.

For these and other reasons, the Commission does not need to specify a fixed end date for any class waiver of the ACS rules in this proceeding. To the extent the circumstances relating to a class waiver change significantly or require further inquiry, the Commission retains authority to seek further comment, or otherwise to address or clarify the class exemption or waiver at that time.⁵

2. The time period for developing new game consoles varies.

The console market is highly competitive, and the three leading manufacturers of home console systems (Microsoft, Nintendo, and Sony) strive to differentiate themselves from one another by, among other distinctions, offering different technical advantages. For example, when Microsoft released the Xbox in 2001, it was the first of the three to incorporate an integrated broadband adapter and a platform-based online service. When Nintendo launched the Wii in 2006, it included new controller technology with motion sensing capabilities and simplified the game experience, opening up gameplay to millions of consumers who were uncomfortable using traditional controllers. And Sony developed for its PlayStation 3 a new chip architecture so innovative that it has been used by the Department of Defense to analyze satellite images.⁶

The video game industry's pursuit of technological innovation, which different console makers may take in different directions, means that the development period may vary significantly among manufacturers or for any particular product. Accordingly, it is not possible to peg the development period to a specific duration which holds true for the entire industry or over multiple generations of console hardware.

⁴ See Regulatory Review Executive Order at 1.

⁵ See, e.g., Public Notice, Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules, CG Docket No. 05-231 & ET Docket No. 99-254, DA 10-2050 (CGB rel. Oct. 25, 2010) (examining, among other matters, whether changed circumstances require modification of revenue exemption or other aspects to the closed captioning rules). Other interested persons or groups also may seek Commission action through the petition process. See, e.g., Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking (submitted Jan. 27, 2011) (questioning certain closed-captioning class exemptions).

⁶ *Department of Defense buys 2,200 PS3s to Upgrade Supercomputer*, **Gizmodo**, Nov. 29, 2009, <http://gizmodo.com/5414938/departments-of-defense-buys-2200-ps3s-to-upgrade-supercomputer>.

Of late, the gap between successive generations of a particular manufacturer's home console platform has been roughly five years,⁷ but this historical accounting also is not helpful to predict the timing of future releases for several reasons.

First, the gap between successive generations of new platforms is lengthening. Although ESA has no knowledge of when any new system may be introduced, all three console makers are already at or past the five-year mark with their current generation systems. Only one has even announced a new home console system, albeit with no indication of a specific launch date. That manufacturers are facing an extended period to design, develop, produce, and launch a console is not surprising. Consoles are becoming more complex, and require more time and resources to develop and to assess potential tradeoffs, while consumers appear to want additional innovations before considering a new system.

Second, the current generation of home game consoles affords both game developers and console makers further opportunities to innovate without the need to introduce entirely new systems. For example, the introduction of innovative new controllers mid-cycle for the Xbox 360 and PlayStation 3 extended consumer interest in those platforms and opened new gameplay opportunities for millions of consumers. In the fall of 2010, five years after Microsoft released the Xbox 360, Microsoft launched the Kinect for Xbox 360, an innovative new peripheral that enabled consumers to interact with the Xbox 360 using gestures and spoken commands without the need to hold a controller. At roughly the same time, Sony launched an advanced new controller, the PlayStation Move, which offered high-precision, gesture-based input. Both console makers sold millions of their new peripherals over the next year. Additionally, game developers are still exploiting the powerful graphics capabilities of current console systems.⁸ In light of these technical developments, it's not surprising that at least one console maker has predicted a 10-year lifecycle for its current generation system.⁹

Third, the gap between the launch dates of the prior and new game systems is not a good proxy for how long a legacy system is useful to consumers. Even after the launch of a new game system, the legacy system continues to thrive, sometimes for years. For example, Sony launched the PlayStation 3 in 2006. Nonetheless, game publishers continued to develop and release new games for the PlayStation 2 for the next two years,

⁷ **Nintendo**: Super Nintendo (1991), Nintendo 64 (1996), GameCube (2001), and Wii (2006); **Sony**: PlayStation (1995), PlayStation 2 (2000), and PlayStation 3 (2006); **Microsoft**: Xbox (2001), Xbox 360 (2005). Data is based upon North American launch dates.

⁸ Chris Remo, *EA CFO: Slow Price Cuts, Powerful Hardware Will Slow Console Transition*, **Gamasutra**, Feb. 23, 2010, http://www.gamasutra.com/view/news/27364/EA_CFO_Slow_Price_Cuts_Powerful_Hardware_Will_Slow_Console_Transition.php.

⁹ Tor Thorsen, *Sony chief warns PS3 will be "expensive"; PS2 hits sales highs*, **Cnet Australia**, July 25, 2005, <http://www.cnet.com.au/sony-chief-warns-ps3-will-be-expensive-ps2-hits-sales-highs-240056080.htm>

and, in 2007, Sony sold nearly four million PlayStation 2s in North America.¹⁰ Microsoft continued to support Xbox LIVE for users of the original Xbox until April 2010, nearly five years after it launched the Xbox 360.¹¹

For all these reasons, it is not possible to project a reliable or non-speculative timeline between generations of successive home console systems.

3. *The video game industry has taken steps to help individuals with disabilities.*

The game industry is continually striving to find ways to make our products and services fun, exciting, and playable by a wide range of consumers, including individuals with disabilities. Several game publishers have taken steps to make their products more accessible, and in that sense have actually gone beyond the CVAA, which is focused on ACS, not gameplay generally.

- **MLB 11: The Show.** Sony Computer Entertainment of America, the publisher of a popular baseball game, “MLB 11: The Show,” for the PlayStation 3 worked with the Association for Disabled Virtual Athletes to create a default “ADVA mode” that adjusted many of the game’s roughly 70 different user settings to make it easier to play by individuals with disabilities. For instance, in regular gameplay, a player up to bat would need to manipulate several controller buttons to move the base runners while also anticipating the pitch. In ADVA mode, however, base running is automatic while the player is at bat. But once the ball is in play, the player can control the base runners. Or, in another example, instead of positioning the outfielder to catch the ball using one of the joysticks and then using buttons to decide where to throw the ball, fielding the ball is automatic. The player must still decide when and where to throw the ball. In this manner, the ADVA mode preserves the key strategy decisions while minimizing the physical factor.¹²
- **Kinect Accessibility Roundtable.** In the fall of 2010, Microsoft convened both an internal Kinect Accessibility Summit for its employees and a Kinect Accessibility Roundtable for global gaming accessibility experts to review and assess the Kinect for Xbox 360 prior to public sale last fall. At these day-long events, Microsoft’s Chief Accessibility Officer, along with Interactive Entertainment Business policy and engineering professionals, demonstrated the product and led hands-on sessions followed by discussion and feedback

¹⁰ Brandon Boyer, *NPD: 2007 U.S. Game Industry Growth Up 43% to \$17.9 Billion*, **Gamasutra**, Jan. 18, 2008, http://www.gamasutra.com/php-bin/news_index.php?story=17006.

¹¹ See Larry Hyrb, [Xbox Live being discontinued for original Xbox consoles and games](http://majornelson.com/2010/02/05/xbox-live-being-discontinued-for-original-xbox-consoles-and-games/), **Major Nelson**, Feb. 5, 2010, <http://majornelson.com/2010/02/05/xbox-live-being-discontinued-for-original-xbox-consoles-and-games/>.

¹² See [How a Video Game Made Him Into a Major Leaguer](http://kotaku.com/5746736/how-a-video-game-made-him-into-a-major-leaguer), **Kotaku**, Jan. 29, 2011, <http://kotaku.com/5746736/how-a-video-game-made-him-into-a-major-leaguer>.

conversations tailored to gather design and feature input from the accessibility community.

- ***Kinect for Windows SDK***. Earlier this year, Microsoft released a software development kit to allow the academic and enthusiast communities to access the innovative technology within the Kinect. With this free, non-commercial kit, anyone with an interest in the Kinect and developing skills can create programs that utilize Kinect's multiple visual and audio sensors in groundbreaking new ways.
- ***My Football Game***. In 2009, EA Sports partnered with VTree LLC, a developer of software for the disabled, to create a PC-based football game for individuals with disabilities. One of the key constituencies for the game would be disabled U.S. veterans, many of whom grew up playing EA Sports video games, such as "Madden NFL." EA Sports licensed its core game engine to VTree and collaborated with VTree to develop a football game that was accessible to those with physical or developmental disabilities. For example, the play clock was removed and the menus simplified. Prior to moving to full game competition, the game guides players through practice drills to build confidence in skills such as running, tackling, passing, and kicking. Importantly, however, the game looks and feels like a "Madden NFL" game. It also has an achievement system, a common feature in many of the mainstream sports games.¹³
- ***Shoot 1Up***. Released in 2010, Shoot 1 Up is a shooter game available for download on Xbox LIVE Arcade. It has a wealth of accessibility options, including: full-button remapping, single-button mode, the ability to set certain functions to automatic (e.g., auto-fire), adjustable speed, and the ability to modify brightness and contrast.¹⁴
- ***Peggle***. This is an arcade-style casual game in which the player must be able to differentiate between different color pegs. The publisher, PopCap Games,¹⁵ implemented a "color blind" mode that makes it easier to distinguish between the different color pegs by superimposing different geometric shapes over them.¹⁶ The "color blind" mode is available on six other PopCap games, including the online game "Zuma Blitz."

¹³ See *EA Sports and VTree LLC Develop Football Game Designed for Disabled Gamers*, **EA Sports**, Nov. 23, 2009, <http://www.easports.com/news/item/file/MyFootballGame>.

¹⁴ See *Shoot 1UP Customization*, **YouTube** (July 22, 2010) http://www.youtube.com/watch?v=zqAeD6TBZt8&feature=player_embedded

¹⁵ PopCap Games is owned by Electronic Arts, an ESA member company.

¹⁶ See *Color blind gamer*, **The Goto of the Underground**, Dec. 30, 2008 <http://blahg.res01.net/2008/12/color-blind-gamer/>.

This is merely a representative sample, and certainly the industry will continue to explore new ways to leverage its innovative technologies for accessibility. Notably, none of these advances would have been the sort of change even arguably mandated under the CVAA, as the CVAA directs the Commission to focus on offerings that have a primary purpose of providing advanced communications services, not gameplay.

Game publishers are not the only ones harnessing the innovative use of video game technology to help individuals with disabilities. For example, a research group at the University of Nevada, Reno has developed a way for blind players to remain active by using auditory and vibrotactile indicators to play the Wii.¹⁷ And researchers at the University of Vermont have created two games to help children with cystic fibrosis perform breathing exercises.¹⁸ Children navigated the games using devices that measure the speed and quantity of breath. Those who played the games were shown to have “a significant improvement in adherence to their breathing exercise regime.”

We appreciate that the FCC has an important and worthy charge in this proceeding to increase access to advanced communications services for persons with disabilities, and we continue to support the implementation of the CVAA consistent with the parameters Congress provided, including the multiple-purpose waiver.

Respectfully submitted,

/s/ Christian Genetski

Sr. Vice President & General Counsel
Entertainment Software Association
575 7th Street NW, #300
Washington, DC 20004

cc (by email): Amy Levine, Senior Counsel & Legal Advisor to Chairman Julius Genachowski
Jessica Almond, Special Counsel to Chairman Julius Genachowski
Margaret McCarthy, Wireline Policy Advisor to Commissioner Michael Copps
Christine Kurth, Policy Director & Wireline Counsel to Commissioner
Robert McDowell
Louis Peraertz, Legal Advisor to Commissioner Mignon Clyburn
Karen Strauss
Doug Brake
Rosaline Crawford

¹⁷ Mike Fahey, *VI Fit is Wii Sports for the Blind*, **Kotaku**, June 4, 2010, <http://kotaku.com/5555740/vi-fit-is-wii-sports-for-the-blind>.

¹⁸ Neal Ungerleider, *Kids With Cystic Fibrosis Breathe Easier Thanks To Video Games*, **Fast Company**, May 4, 2011, <http://www.fastcompany.com/1751537/cystic-fibrosis-gamification>.

The Secretary
August 17, 2011
Page 8

Eliot Greenwald
David Hu
Jane Jackson
Elizabeth Lyle
Vijay Pattisapu
Brian Regan
Genevieve Ross
Janet Sievert
Jeffrey Tignor